Supreme Court of the United States.

No. 307.

GERTRUDE I. NYE, Appellant,

vs.

CEDAR POINT CLUB, Appellee.

BRIEF FOR APPELLEE.

POTTER & EMERY,

Solicitors for Appellee.

Supreme Court of the United States.

No. 302.

GERTRUDE J. NILES, Appellant,

v.

CEDAR POINT CLUB, Appellee.

BRIEF FOR APPELLEE.

POTTER & EMERY,

Solicitors for Appellee.

STATEMENT OF FACTS.

In the main we deem it unnecessary to take exception to appellant's statement of the facts upon which this controversy is based. It is at least proper, however, to say that while not directly calling in question the facts agreed upon and established, as to what has been and is the character of the land in controversy, appellant's counsel assumes without evidence, and bases his argument upon assumption, that the facts are the exact opposite of what the agreed statement of facts, and items of evidentiary fact, show that character to have been and to be.

That is, he assumes that the respective conditions of this land as shown first at the time of the Rice survey, second, at the time of the taking effect of the Swamp Land Act in September, 1850, third, at the time of the Marston survey, and fourth, in the year 1895, were each in turn the then normal and natural and measurably permanent conditions; and that the change from one extreme in 1834 to the other in 1895 was the result of gradual but permanent receding of the waters of the lake, whereby what was in 1834 a part of Lake Erie, or of a measurably permanent shallow lake or pond, had in manner aforesaid become measurably permanently dry land.

This is, we submit, clearly contrary to not only the fair meaning of the agreed facts, but to every item of evidence bearing upon this subject.

That the condition existing at the time of the Rice survey was unusual and exceptional, and why it was so, is set forth in the agreed statement of fact, item 16, printed record, pages 28 and 29, thus:

"16. At the time of the making of the survey by Ambrose Rice the waters of Lake Erie were above their ordinary stage and there was more than the usual volume of water standing upon the land in controversy herein and flowing to and upon the same from

the large bodies of land now in Ottawa, Wood and Lucas counties, respectively, having their drainage to and through the said premises in controversy herein."

That the condition of the land, existing in 1895, was in turn unusual and exceptional, and what occasioned it, is in like manner set forth in the agreed statements of fact, paragraph 18, page 30 of printed record, thus:

"18. By reason of unusual drouth which during the years 1893, 1894 and 1895, prevailed quite generally over the region of country from which Lake Erie and its tributaries derive their waters, including that the drainage whereof was to and through the premises in controversy, the major portion of the said premises was dry during the summer of 1895, except in case of heavy local rains or when the adjacent waters of Lake Erie were higher than they usually were during that summer".

The general and normal condition and character of the land are shown:

1. By the fact that in 1834 surveyor Rice unmistakably distinguished it from that of either lake, bay, river or pond by designating it as "marsh".

2. By the fact that, in 1850, the question controverted between the state of Ohio and the United States, was not, whether this land was or was not in such manner a part of the bay or lake or covered by such body of water as that the state was for that reason entitled to it; but, rather, all parties treating it as land obviously and unquestionably subject to survey, and to absolute sale, by either the state or United States, the sole question was whether it was such character of land as the state was entitled to under the swamp land acts; and the conclusion reached, adhered to and acted upon by the Land Department was that it was not swamp land; which meant, at least, that the greater portion of the tract was not swamp land.

3. By the usual and natural condition and normal character of the land as reported by surveyor Marston, the correctness of which report is expressly agreed to by the parties hereto as the basis of submission of this case in their agreed statement of facts, paragraph 17, on pages 29 and 30 of printed record; and which condition and character are substantially set forth in Surveyor Marston's report, viz:

"The surface of that part of this fractional township, comprised in this survey, is covered with a deep marsh of grass, canes or reeds, wild rice, etc. Many parts of it particularly in the south and west parts are mown for a kind of coarse hay. Other parts are filled with bogs and pond holes that do not dry in summer. It receives the natural drainage from the woods on the south and west, which without any well-defined channel, finds its way across the marsh to the lake. Again in heavy gales of wind it is subject to inundations from the lake, which upon the subsidence of the gale or change of direction in the wind, slowly finds its way out again into the lake".

4. By the usual and natural condition immediately before

and until and except as temporarily changed by the extraordinary drouth of 1893 to 1895, as in effect and in all fair inference conceded by the setting forth in the ageeed statement of facts, paragraph 18, of the conditions existing in 1895 as exceptional, and setting forth the especial cause of such exceptional condition.

As matter of fact then we submit that each and every item of evidence and fact submitted in the case tends to establish the natural and normal condition and character of this body of land as having been and being such as the ascertainment and determination of the Land Department in 1850 found and adjudged it, and the actual survey and report of surveyor Marston in 1881 specifically confirmed it, and such as constituted it a proper subject of survey and sale as public land of the United States.

With reference to the boundary line in question appellant's counsel says that Marston "surveyed and subdivided this whole marsh shown upon the plats, taking as his southern boundary the meander line run by Rice". While this is true, the farther fact concerning this line is also true, and so stipulated by the parties hereto (printed record page 17, paragraph 6 and page 21, near top of page) that it "is identical with the boundary line between the surveyed lands and the 'flag marsh' and 'impassable marsh and water' as shown upon the plat of the survey made by Ambrose Rice". So, we also submit, that as a matter of fact it stands admitted that the existing "marsh" referred to as the natural boundary, coincided specifically with the mention and notation of it in the survey and upon the plat constituting the basis of appellant's title.

This border line of the "marsh" as surveyed by Rice is the southerly line of the Marston survey.

APPELLANT'S CONTENTION. UPON WHAT IT PURPORTS TO BE FOUNDED.

The ground upon which the title of appellee, claiming under the Marston survey, and patents in pursuance thereof, is called in question by appellant, is, that the title to this 4900 acres of land had previously passed from the United States to appellant's ancestor Bailey, and thence to appellant by operation of law arising upon and applicable to some one or other state of fact following:

1. That the tortuous actually surveyed and marked lines of the fractional sections, which it is agreed "were identical with the southerly edge of the marsh", was the ordinary statutory meander line, in that it was not in any sense a boundary line, and that the "flag marsh", was in no sense a boundary because the surveyor had no authority to thus constitute and bound fractional sections and the surveyor general had no authority to approve such boundary and hence that neither the surveyed line nor the marsh in any wise limited the area of title carried by the patent.

2. That the premises in controversy, which the Rice survey and plats thereof designated as "marsh" were, at the time of the

Rice survey, in fact a part of Lake Erie and hence not subject to survey and sale by the United States; that the lake was in fact the boundary, and that by the gradual receding of the water, and shore line, of the lake, what was in 1834 a part of the lake has become dry land and appellant as riparian proprietor has derived title thereto as of title by reliction.

3. That if the premises were not a part of Lake Erie they were a shallow lake or pond and the land would belong to the state or to riparian proprietors as the rule of law of the state should determine, and that by this rule of law appellant has acquired title.

4. That if the premises were neither a part of Lake Erie nor a lake or pond, but "a body of low swampy land, partly boggy, partly dry", or in other words "a marsh", there was no water line to limit the grants in the Bailey patents, and they would be limited only by the lines of the sections extended as the Marston survey extended them.

ARGUMENT.

1. As to matters of fact in dispute.

If and so far as the submission of this case may be fairly regarded as presenting questions of fact that are debatable, it seems to us preferable to deal with those questions of fact before proceeding to consideration of the rules of law applicable to them.

We therefore first give attention to such matter of the brief of appellant's counsel as has reference to the contention on her behalf that the premises in controversy were at the time of the Rice survey (1st) a part of Lake Erie; (2nd) a shallow lake or pond or (3rd) that there was no water line to limit the grants.

The agreed statement of facts upon which this case was submitted for adjudication and decree, sets forth that the land included in the Rice survey and Bailey patents, had as its northerly line or boundary the tortuous meandering line which it is agreed was actually surveyed by Rice, and the courses and distances thereof specifically and in detail reported by him to the Surveyor General and which was approved by him and correctly indicated upon the township plats which together with the accompanying field notes were certified to the land office where they constituted the basis of the sale and patent to appellant's ancestor Bailey of the fractional sections thereby exhibited and particularly described. Also that the line thus described in the field notes and exhibited upon the plats is identical with the line of the margin of the water of the marsh as it stood at the time of the survey.

The copies of plats and field notes submitted, show that the survey and plats, upon and in pursuance of which the fractional sections were sold and patented, did not simply show a general area of lake, bay and marsh without anything to distinguish substantially each from the other, but on the contrary showed and plainly distinguished what portion was "lake", what was "bay" and what was "marsh", with a well defined and marked shore line at the margin of the lake and between it and the marsh.

The fact is also submitted as entirely undisputed that the water of the lake and that upon the "marsh" was above its usual and accustomed stage at the time of this survey.

It is not disputed or in any wise called in question by any evidence or fact submitted in the case, that at the date of the Bailey purchase and patent, ten years after the survey, the exceptionally high water, existing at the time of the survey, had subsided, and that the land in dispute was as manifestly then as at the time it was claimed by the state of Ohio, or at the time it was surveyed by Marston, a proper subject of survey, sale and patent.

The brief of appellant's counsel does not make plain, to us, how the fact, if it be a fact, that this lake shore or beach washed shoreward sufficient to reduce the area of the "marsh" from 6000 acres in 1834 to 4700 acres in 1881 affords any support for appellant s contention that the 6000 acres was in 1834 a part of Lake Erie rather than the mere "marsh" that surveyor Rice reported it. The stipulation of fact, to which the counsel refers, is that

"A comparison of the survey made by Ambrose Rice in 1834 and 1835, with that made by John B. Marston in 1881, indicates that Sandy and Crane Islands washed somewhat shoreward during the period intervening between the making of said respective surveys".

We invite attention, however, to just what the comparison of the maps does show and submit that it does not indicate change to anything like the extent that appellant's counsel claims.

To us it seems manifest that the figures 2500, 1500 and 2000, respectively set forth as the number of acres claimed in behalf of the state of Ohio in these three townships, were thus stated in round numbers without any attempt at approximate accuracy.

Nor is there anything to indicate that the entire difference, whatever it is, is referable alone or mainly to the distance which the beach or shore of the Lake may have encroached or advanced shoreward upon the particular portion of theshore line mentioned in this stipulation.

This body of marsh land has on lake and bay all told about twelve miles of shore line, of which nine and one-half miles is at right angles with, and fronting against the course of the strong winds which all the facts in the case show to be productive of the high water which causes temporary inundations of this land, and thus gives it character as a marsh.

If the claim and argument of appellant's counsel based upon the mere discrepancy between the number of acres stated in Ohio's claim of this as swamp land, and Marston's survey of it as 4900 acres, instead of 4700 as the counsel states it, needs any answer, we think appellant's counsel has himself furnished a complete one in the first paragraph on page 16 of his brief:

"It is a matter of common knowledge that the loss incident to having such a neighbor is not small. As an illustration of this self evident fact, it may not be improper to state that nearly half of the land inside the meandered line, in sections 19, 20 and 21, bordered by this aggressive and irresistible neighbor as shown on

the plat, given in the opinion of the Court, page 50, patented to Margaret Bailey at the same time as the eleven involved in this suit and paid for by her, have been washed away and are now part of Lake Erie."

Reference to the plat, printed record opposite page 46, shows these sections 19, 20 and 21, as containing 1394.73 acres with a shore line of three miles on Maumee Bay.

This bay shore, as all of the plats show, is very much protected by Cedar Point and the land in controversy, from the washing by waves driven by winds that come from the direction to cause high water.

Yet if 600 acres, much less than half of this 1394 acres, included as up land in the Rice survey, have been washed away and become a part of Lake Erie, or Maumee Bay, the average distance that this three miles of beach or shore line has been washed shoreward is more than one hundred and sixteen rods. It occurs to us that these changes of position or locality of shore line do not in the one case more than the other, and do not in either case, tend to establish that surveyor Rice committed any error in the respective classifications of what he did classify and separately distinguihs as "Lake", "Bay" and "Marsh".

The suggestion on behalf of appellant as to what she has lost by encroachment of the lake, is, as we suppose, made to illustrate how one subject to loss by submergence should be held entitled to gain by accretion or reliction. In fact, however, as it seems to us it serves but to illustrate the absurdity of appellant's contention. If the condition of appellant's dry land had merely become a marsh or swamp would any one contend that she had thereby lost title to it? And upon what reason can it be urged that appellant has acquired title to this "Marsh" merely by reason of the fact, if indeed it be a fact, that the land has less the character of marsh and more the character of dry land than it had at the time of the Rice survey.

If this body of "Marsh" land was indeed a part of Lake Erie, or was not in fact a "Marsh" and as such manifestly and readily distinguishable from the "Lake" or "Bay", we are afforded no reason why Rice did not designate it as lake or bay instead of "Marsh"; no reason why the state of Ohio demanded it as swamp land, and no reason why the United States Land Department did not in answer to that demand say that what was demanded was land underlying the lake or bay. The persistent claim of this land by the state of Ohio as swamp land and the equally persistent rejection of that claim by the United States Land Department, by every fair intendment signified that the United States claimed the right to control and deal with and concerning the land as United States land; and not that upon any hypothesis it was already the property of the state of Ohio with the disposal of which the United States had no concern and nothing to do.

Conceding, for the sake of argument, that a body of land bounded upon one side by the open water of lake or bay, and upon

the other by "Marsh", or "a low, swampy body of land, partly boggy, partly dry" is not commonly called an island, does not lead to the conclusion that the marsh by which it was in part bounded was lake or bay and not marsh. In so far as this seeming inconsistency cuts any figure it goes to indicate that the error, if any, committed by surveyor Rice consisted in calling that island which was not with substantial permanency island; and not in designating as "Marsh" and not lake or bay that which manifestly was not lake or bay but a "Marsh" subject to occasional and temporary inundation.

Nor, for the purpose of the inquiry here, is the body of land in controversy any the less a "Marsh" and as such clearly distinguishable and distinguished from the lake, merely because the water temporarily standing upon it, and by which it was temporarily inundated, was for the time being by either wide or narrow passages directly connected with the open water of the lake.

An answer to whatever of difficulty is presented by the proposition of appellant's counsel, that this "Marsh" was improperly so called in the Rice survey because "An island does not mean a body of land with water on one side and a low swampy body of land, partly boggy, partly dry" on the other, has been furnished us by the same counsel in language as apt, forcible and pertinent to the case in hand as could be desired.

In the brief filed by him in the Supreme Court of Ohio, on behalf of appellant's ancestor James, in the case of James v. Howell, on page eleven of the brief he says:

"We therefore submit the following as our conclusions of uncontested facts:

"1. That the so-called islands were not in fact such, in any usually recognized sense. In the aggregate, they were about seven miles long. Sandy Island, by survey and estimated quantity, is exactly one and a half chains or six rods wide from end to end, while Crane Island is only one chain, or four rods wide from end to end. It is not known that there ever was, and certainly there is not now, any channel between the sand ridges and the meandered lines of Rice's survey of the James lands".

"2. That these said ridges, so-called "Islands", constitute the beach, or shore proper, of Lake Erie, composed almost exclusively of pure sand".

And again on pages 22 and 23 of the same brief he says:

"We have already said that the proof clearly shows that there is no channel, but only a flag marsh between the so-called "Islands" and the main land or meandered lines. They are not bodies of land surrounded by water, nor were they so when the survey was made, for as often as Mr. Rice refers to it, whether as being in front of the main land or back of the so-called "Island", he calls it a "Marsh" or "marsh inaccessible" and in no instance does he call it a channel."

Nor, we submit, does the fact that the commissioner of the land office gave as a reason for the rejection of Ohio's claim of the land under the Swamp Land Act, that it was "not swamp", tend to

at all establish the contention of appellant that it was theretore "Lake" or "Pond" and not "Marsh".

The words "Marsh" and "Swamp" are each, like many other words in the English language, in that they are used in different senses and to convey different meanings. The sense in which the word is used, the meaning intended to be given it, is to be sought in the context or associated words. Webster defines the word "Marsh", as "A tract of low land, usually or occasionally covered with water, or very wet and miry, and overgrown with coarse grass, or with detached clumps of sedge; a fen. It differs from swamp, which is merely moist or spongy land, but often producing valuable crops of grass". The word "fen" here given as a synonym of "marsh" he defines as "low land overflowed, or covered wholly or partially with water, but producing sedge, coarse grasses or other aquatic plants; boggy land; moor; marsh". "Swamp", he defines as, "Spongy land; low ground filled with water; soft, wet ground; marshy ground away from the sea-shore; land wet and spongy but not usually covered with water".

Johnson's Farmers Encyclopedia defines "Marsh" as, "A flat surface, the soil of which is so far saturated with water throughout the year as to be unfit for culture by the spade or plough; but not so much as to prevent it from producing grasses, and other kinds of herbage. Marshes are generally situated in bottoms, where they are kept moist by the water which descends from the surrounding lands; or along the banks of rivers or lakes, where their humidity arises from their being nearly on the same level with the adjoining water".

The same author defines "Swamp" as "Ground habitually so moist as not to admit of being trod by cattle, but at the same time producing particular kinds of trees, bushes and plants. A swamp differs from a bog and a marsh in producing trees and shrubs, while the latter produce only herbage, plants and mosses. In autumn and spring the exhalations from swamps are productive of agues, consequently it is important to fill them up or drain them".

The character of the land to which the Swamp Land Act had reference and which congress by its enactment intended to provide for transfer of, to the state in which it was situated, is clearly indicated by the purpose of the transfer as stated in the Act and the direction contained in the Act, as to how the proceeds arising from the sales of the lands should, so far as necessary, be applied and used. That purpose was to enable the states to reclaim the land by drainage and levees to prevent overflow; and this purpose was to be carried into effect by the application to it, so far as necessary to accomplish such reclamation, of the proceeds arising from the sale of the lands.

United States v. Louisiana, 127 U. S. 152.

This marsh was not at the time of the Rice survey, nor at the taking effect of the Swamp Land Act, and is not now susceptible of reclamation from their humidity arising from their being nearly on the same level with the adjoining water of the lake,

nor from temporary inundations by the waters of the lake, otherwise than by permanent and substantial lowering of the waters of the lake, or prevention of the gales from the north east rolling its high waves upon them; either of which is a project the Swamp Land Act did not contemplate being committed to the state.

Hence the decision of the Commissioner of the Land Office and the reason given by him for that decision, in rejecting Ohio's claim of the land as swamp land, in so far as it related to the character of the land, meant simply that in his opinion the land was not so situated as to render practical its reclamation by drainage or by protection from overflow by levee, and hence that, in his opinion, it was not swamp land within the meaning of that act.

It did not by any fair inference mean that he disputed or called in question the accuracy of the survey, report and plats of surveyor Rice and the Surveyor General in designating the land as "Marsh", and as such clearly distinguishable from the adjacent "Lake" and "Bay".

We cannot think further comment necessary to render plain and clear, the fact, as shown by every item of evidence and of agreed fact upon which this case is submitted, that the body of land in controversy here, was, at the time of the Rice survey, and ever since, a "Marsh" as surveyor Rice designated it, as surveyor Marston more generally and fully described it; and, as the Circuit Court of Appeals in a few words characterizes it, "this low, swampy body of land, partly boggy,. partly dry, and sometimes subject to temporary inundation".

DISCUSSION OF ABSTRACTIONS MAY PROPERLY BE IGNORED.

In the case of Bates v. Railroad Company, 1 Black Rep., page 204, this court, speaking by MR. JUSTICE CATRON, says:

"In regard to the matter so much and so ably discussed in in the argument here, as to the rights of proprietors on the lake shore, where their fronts were swept away by currents, and to what extent they still owned the lands covered with water, undoubtedly theirs before the decrease took place, we do not feel ourselves called on to decide, because this plaintiff was not the owner of the land sued for before the decrease occurred, and could have no proprietary rights in the bottom of the lake. Before a proprietor can set up his claim to accretions and the like, he must first show that he owns the shore; and if he fail first to establish his ownership, judicial inquiry respecting his rights in or under the waters adjoining are abstractions and useless".

For like reason we cannot deem it desirable that we here answer in detail propositions of appellant's counsel, and arguments in support of propositions, which are at most but interestingly speculative, in that they do not pertain to any matter of fact having even a shadow of foundation in this record.

We are unable to regard otherwise appellant's propositions

that if the premises in question were not a part of Lake Erie they were a shallow lake or pond; and if not this there was no meanderable water line to constitute a boundary or limitation of the grants to appellant; and that the boundary being Lake Erie, as the lake receded her boundary line correspondingly advanced.

Courts are not called upon to and do not, by virtue of or in the exercise of their jurisdiction and authority as courts, consider or construe statutory provisions, or declare rules of either statutory or common law, in the abstract; but, having regard to the facts before them, judicially announce and administer the rules of law, whether of statute or of common law, applicable to and governing the rights of the parties before them, founded upon those facts.

OPERATION AND EFFECT OF PATENTS TO BAILEY.

The question as to what land the United States parted with title to, and thereby vested title to in its grantee Margaret Bailey, must necessarily be determined by the application to the facts and circumstances of the particular case, of the rules of law under and in pursuance of which the patents issued, and those rules of law thus applied must furnish the guage whereby is to be measured the legal effect of the patents, as affecting the rights of grantor and grantee.

In so far as appellant contends that the Rice survey could not have been lawfully made, approved and acted upon, and such action sustained upon any other hypothesis than that the premises designated as "Marsh" were in fact part of Lake Erie and as such omitted or excluded from survey, or some other such lake or pond as should, by the rules of law governing such surveys, have been omitted or excluded from such survey, the entire controversy, and this part of it, none the less, depends upon the construction and application of the rules of law under which these things were done, to determine whether what has been done is susceptible of being given the effect claimed for it, and if not, whether it would for that reason be deemed in whole or in part, and, if any, what part nugatory or ineffective.

FEDERAL GOVERNMENT HOLDS TITLE AS TRUSTEE.

The principle that lies at the very threshold, that must be regarded from the beginning to the end, in the construction of United States patents, is, that the government is regarded as having taken title to the public domain in trust for the people.

Howsoever the United States shall have acquired the title, it is deemed to hold that title in trust. Navigable rivers and lakes and the lands underlying them it is deemed to hold in trust for the whole people in so far as relates to their right to the use thereof as public highways; and for the state that shall be organized, so far as relates to any private ownership, subject to and consistent with the enjoyment of the public easement, except so far as such right of private ownership may be effected by conveyances

prior to the formation of the state; thus leaving the state to determine whether such private ownership shall or shall not be permitted, and the extent to which and terms upon which such private ownership shall be acquired and held; and whether, and the extent to which, such private ownership, control and use shall be independent of or incident and appurtenant to that of land abutting such stream or body of water.

Lands outside of those thus subject to the right of public easement, reservation, or previously acquired private rights, the Federal Government is deemed to hold in trust to dispose of by such method, previously prescribed by legislation, as shall best subserve the interests of the entire people.

This trust is to be recognized in the interpretation and construction of the laws providing for the survey and sale of the public land, and of the patents issued in pursuance of such laws, surveys and sales.

The necessities of the case must be deemed to contemplate the lodging and vesting in some tribunal, board or officer the duty of ascertaining what part of the domain to which the general government has thus acquired title, shall be regarded as falling within the one classification and thus subject to the trust imposed upon *it*, or within the other classification and subject to *its* trust incidents.

If the question arises between the Federal government or its grantee, and one of the original states or its grantee, concerning domain surrendered by the state to the general government, the question presented would involve the determination of the extent to which the state had surrendered its properties, rights and franchises to the general government, and this would be determined by the construction of the instrument or instruments by which that surrender had been consummated.

The question arising between the general government or its grantee and a state subsequently organized or its grantee concerning public domain within that state, depends upon the interpretation and construction of the constitution of the United States, and laws enacted in pursuance thereof, whereby the subsequently organized state is placed upon an equal footing with the original states; and, would involve, though from a different standpoint, the same consideration, viz: what of the public domain within its borders was of the character to stand charged with the public easement, and, subject to that charge, to be deemed at the disposal of the state for private ownership, control and use, in so far as these should not interfere with the enjoyment of the public easement; and, what within other classifications.

The tribunal selected for the determination of these questions and the method by which they are to be determined as applied to the facts and circumstances in any and every instance, is that of the land department of the general government, and its method of ascertaining the facts and conditions to which are to be applied the rules governing the trust, is by actual survey of the public domain under authority and direction of the surveyor general, the

making by him of plats showing such survey and his certification of the survey, field notes and plats to the chief officer of the land department, and his approval and authentication thereof, and publication thereof at the offices where the lands are exposed to sale, as constituting the foundation of patents.

In the discharge of the duty thus imposed upon it, the land department proceeds in pursuance of rules prescribed by acts of Congress, passed by authority conferred by the constitution. It is sufficient for the purposes of this case to say that in the absence of obvious mistake or positive wrong the determination of that tribunal upon the subjects and questions thus committed to it is to deemed final and not subject to review by the courts.

Johnson v. Towsley, 13 Wall, 72.
French v. Fyan, 93 U. S. 169.
Ehrhart v. Hogaboom, 115 U. S. 67.

Any attack upon or inquiry as to the propriety or validity of the action of the land department or its agencies in and about the survey and classification of the public domain must of necessity involve and constitute an inquiry as to whether the department and its agencies have proceeded in substantial conformity to the rules prescribed for their action and conduct by the enactments of Congress providing therefor, and whether the classification concluded upon was made in the exercise in good faith of the powers conferred by these enactments, and in substantial conformity to the rules that they prescribe. Indeed no other source could be looked to for light whereby to determine the issue presented.

No evidence has been offered tending to show that the classification of the premises in question as "flag marsh" instead of river or bay, or lake was in any wise erroneous. By whatsoever exigency such classification might be made the subject of attack the question as to its accuracy would still be determined by the application to the particular facts and circumstances of the rules of law governing the action and conduct under review, and in the light of the rules of law by which should they have been governed. That is, such would be the inquiry in so far as the court should deem evidence presented in support of it admissable or pertinent.

McCormick v. Hayes, 159, U. S , 332.

FEDERAL GRANT IN EXECUTION OF TRUST TO BE CONSTRUED STRICTLY. NOT EXTENDED BY IMPLICATION.

While the title of Federal Government is more absolute than that of the individual can be, it is a trustee rather than an owner in its own right; and, recognizing that, as the foundation upon which its grant is based, from which its authority to grant arises, the same rule does not apply to it as does to the grant by an individual owner, in this: that whereas the individual owner in making his conveyance is regarded as the party who has selected the words

by which he defines the extent of his grant, and the rule applicable to him is the rule generally applicable to that party who is regarded as the sole source of the expression or wording of the obligation that he assumes, and is that it is to be construed most strictly against him, and in favor of the party taking under it. The opposite is the rule that the authorities uniformly recognize as applicable to the grant by the general government. Being the holder of the title in trust, it is regarded as using the instrument selected by it, the patent, as one of the methods of carrying into effect that trust; it is regarded as, by the patent it issues, disposing of, in the execution of this trust, just what that patent specifies and no more. And some part only of the patent is not to be looked to, some part only of the description is not to be looked to, but the whole patent, as well for limitations upon the grant, as for the description of the grant itself. And so, where the patent refers to a plat, that plat is to be regarded as a part of it, the same as if embodied in it. In like manner the quantity stated in the patent while when stated in the deed of an individual grantor is regarded as mere matter of description—something by which the premises are to be identified—but not a limitation upon the quantity or an extension of the quantity, merely one of the incidents of description as it might be termed; while in the government patent *it* is to be regarded as matter of essential description.

In *Shively v. Bowlby*, the question was whether a patent describing the land thereby conveyed as bounded by the Columbia River passed title to land below high water mark. *Mr. Justice Gray*, delivering the opinion of the court thus announces the rule pertaining to the construction of grants by the United States:

"It was argued for the defendants in error that the question presented was a mere question of construction of a grant bounded by tide water, and would have been the same as it is if the grantor had been a private person. But this is not so. The rule of construction in the case of such a grant from the sovereign is quite different from that which governs the private grants. The familiar rule and its chief foundation were felicitously expressed by Sir William Scott: 'All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away'. The Rebeckah, 1 C. Rob. 227, 230. Many judgments of this court are to the same effect."

"The decisions of this court referred to at bar, regarding the shores of waters where the ebb and flow of the tide from the sea is not felt, but which are really navigable, should be considered with reference to the facts upon which they were made, and keeping in mind the local laws of the different states, as well as the provisions of the acts of Congress relating to such waters".

"Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future state when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution in the United States".

152 U. S., 1, 10, 31, 58.

VALIDITY AND EFFECT OF RICE SURVEY AND PLATS.

The legal effect of the Rice survey, the report of that survey and the plats thereof by the surveyor general to, and their approval by the Commissioner of the General Land office, and the sale of the "fractional sections" thus surveyed and platted, and the issuance and delivery of patents therefor, of the form and character shown herein, is to be ascertained and determined by the construction of the provisions of the United States statutes under and in pursuance whereof the survey and plats were made and approved and made to constitute the foundation of the sale and patent of the "fractional sections", and the application to these transactions and facts of the rules of law which those statutory provisions, so construed shall be found to prescribe.

The Rice survey included: 1st, The Surveyed land to the margin of the "impassable water and marsh", the boundary of which surveyed land is correctly indicated by the line, the legal effect of which is in question herein; and, 2nd, The Islands some nine and one-half miles in length bordering the Lake and separating the lake and the marsh, except at three shallow inlets a few rods each in width.

Under and in pursuance of the Rice survey plats thereof were made by the Surveyor General and by him certified together with the field notes of the survey to the Commissioner of the General Land Office; the Commissioner approved the survey and plats and duly authenticated copies thereof were forwarded to the land office at Bucyrus to be there exhibited to proposed purchasers of the premises surveyed.

The plats showed the sections bounded by the line in question as being, not square sections but "fractional sections"; not abutting upon a navigable stream or any stream, nor upon any navigable lake or any part or parcel of a navigable lake, or lake of any sort; but upon an area designated as "marsh".

Upon the information thus given these fractional sections were sold, and the patents thereof issued and delivered to Margaret Bailey.

The patent in each instance in and by which title was conveyed mentioned the section as being a "fractional section", stated the number of acres it contained, with the recital "according to

the official plat of the survey of said lands returned to the general land office by the Surveyor General".

By means of the plat, thus effectively made a part of each sale and patent, the designation thus given to this intervening space constituted affirmative notice to the proposed purchaser and patentee, and to whomsoever should succeed to the title evidenced by the patent, that this unsurveyed area was not in any wise a part of any stream or body of navigable water, and that it was not a part of any such body of water as, standing charged with the public easement, it has been and is the policy of the United States to leave to the state the determination of the extent or degree to which, and means by which the underlying land may be the subject of private ownership.

MARSTON SURVEY AND PATENTS UNDER WHICH APPELLEE CLAIMS TITLE.

By means of the Marston survey, duly approved by the proper authority, the area which upon plats of the Rice survey was designated as "marsh" was surveyed and divided into sections, thus establishing eight new fractional sections aggregating 1667 13-100 acres, no part of either of which sections appeared upon or was included in the Rice survey, or the patents issued thereunder. By that survey also the lines of the eleven "fractional sections" of the Rice survey were in regular course extended over said intervening marsh, whereby in the aggregate an additional 3234 77-100 acres was included in these eleven "fractional sections"; the total area of the flag marsh being 4901 90-100 acres.

Under and in pursuance of this Marston survey the 4901 90-100 acres of land included therein was sold by the United States at public sale, for a consideration aggregating more than $20,000, and patents thereof made and delivered to Hanna and Lacourse under which patents and conveyances by the patentees, appellee claims to have derived title to this 4901 90-100 acres of land.

It being submitted and undisputed that the land department proceeding upon the theory that the reasons upon which this territory had been omitted from the sectional subdivisions of the Rice survey did not preclude its being surveyed as undisposed of United States Government land, had caused it to be surveyed, approved the survey, sold and gave patents purporting to convey the land; it would seem but fair that the party attacking the validity of this procedure of the land department should establish by evidence the facts relied upon to impeach it.

However, as we find the case submitted for determination, not upon the evidence, but rather in spite of the evidence, the appellant contends that this area which Rice did not survey was in fact part of the Lake, because if it were not, Rice was without authority of law to establish a line which sober husbandmen have experienced so much difficulty in keeping the right side of.

Supposing the conduct of surveyor Rice in this regard

to have been irregular, and that the proper discharge of his duty would have required the survey into sections and proper subdivisions of sections of this "flag marsh", his failure to do this, and returning his survey as he did, cannot change either the character of the property or the ownership thereof, nor result in carrying to a patentee of the surveyed land title to that which should have been surveyed but was not.

We cordially coincide with the statement of appellant's counsel that:

"The Government made this plat to show what land it had for sale. Both parties accepted the plat as giving the truth as to what was lake and what was land, the sale was made and the plat was made part of the conveyance, and neither party can be heard to question it."

We beg to add right here the observation that the Government made this plat to show also what was "Marsh". Both parties accepted the plat as giving the truth as to what was "Marsh" and that the fractional sections bordering it, did not border upon "Lake" or "Bay", or any body or stream of navigable water, but upon "Marsh", and "neither party can be heard to question it".

THE RULE OF LAW AS TO MEANDER LINES.

In the presentation of this case we unhesitatingly concede to its fullest extent as well established, and founded upon sound reason, the rule that where surveys and plats of public lands show fractional sections having as their boundary streams or bodies of navigable water, a meander line purporting to indicate and follow the margin of *such* waters, is not, and *such water line* is the boundary. We do not desire to in any whit question the force or integrity of this rule, nor that any limitation be imposed upon it. That the scope of the rule is as here indicated the authorities cited by opposite counsel clearly enunciate.

"The meander lines run in surveying fractional portions of the public lands *bordering upon navigable rivers*, are run, not as boundaries of the tract, but for the purpose of defining the siuuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction, and which is to be paid for by the purchaser".

Railroad v. Schurmeir, 7 Wallace, 272.

"It will be observed that the government surveys made in 1834-5 upon which the patent was issued, not only laid down a meander line next to the lake, but also described said lines as running 'along the margin of the lake'; and the plat of the survey, returned to the general and local land offices, and referred to in the patent for identification of the land granted, exhibited the granted tracts as actually bordering upon the lake; and the lake itself on said plat was marked with the words 'Navigable lake', although the fact found by the court is that the lake was not and is not a navigable lake, but a non-navigable fresh-water lake or pond. * * * *

"It has been the practice of the government from its origin,

in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of *such* waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to *such* meander lines. It has frequently been held, both by the Federal and state courts that *such* meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary."

Hardin v. Jordan, 140 U. S. 371.

"In this case the United States Surveyors obviously surveyed the plaintiff's lot only to a *bayou* which they called the Indian River, leaving a tract between the bayou and the river unsurveyed; and the plaintiff has no right to challenge the correctness of their action, or to claim that the *bayou was not* the Indian River or *a proper water line* on which to bound the lots."

Horne v. Smith, 159 U. S. 40.

Under the statute, the meander line, such as that statute contemplates might be run at the intersection or upon the margin of navigable water. There is no evidence here tending to show that the surveyor or anyone having to do with survey or plats, regarded this marsh as navigable water or a part of any body, stream or channel of navigable water; on the contrary, although adjoining the lake and bay they definitely distinguish it from both; it is not the lake, not the bay — it is a marsh. For the time being the water was perhaps too high for the surveyor to actually survey and properly mark the lines and corners for proper subdivision of it at the time, but whatever the reason of it was, everything in evidence here shows the absence of that sort of condition that would have warranted him in making that a meander line that should evidence that the government proposed not to regard the land beyond it as public land for future survey and disposal. In line with this is the claim and contention and the theory of the government itself as shown by the circular put in evidence, that where for temporary reasons ground covered by water, *not a part of a body or stream of navigable water* was meandered instead of being surveyed out, such land was regarded as government land, not parted with and the right of the government retained to survey it, when the time should come that it should be a proper subject of survey, to the end that it might be disposed of in the discharge of the trust imposed upon it in the hands of the government. So that was the condition of affairs that Mr. Rice had to deal with when making this survey, and upon the showing made here we contend that he did just what was his duty to do. Being unable to survey this marsh land at the time he ran the boundary line between it and the land that he did survey. The plat was made by Mr. Surveyor General Lytle, showing the contents of the fractional sections; it was fractional sections that were disposed of, their contents were named, and the patent referred to the plat which with its marginal

field notes shows exactly the lines actually ran and surveyed bound ing each of these fractional sections.

And, following that, it appears by the patent issued to Margaret Bailey, that her patents were issued in pursuance of purchase made at the General Land office at Bucyrus. At that office of course they had this plat, or a proper authenticated copy of it, to which a purchaser might refer, and undoubtedly did refer, for the purpose of ascertaining just what was the situation of the land which he or she proposed to acquire a deed of, or proposed to bargain for; and that plat and field notes show these facts, that there were, not lines run merely for ascertaining quantities, but lines actually surveyed, posts planted, by which the corners were fixed, as well between these sections, fractional sections, at the intersection of their straight section lines, with the meander line, as at other proper places for posts or definite monuments, to mark their corners and the boundary not the line of or margin of a body or stream of water, but of a marsh. All of this was open to the purchaser, so there is every reason for the application to the case of this rule that the government is not to be regarded as having parted with more than comes fairly within the description of the metes and bounds and the quantity specified in its patent. That rule gives to the purchaser just what, with his eyes open, he is furnished every possible information that could be desired to vest in him perfect knowledge of all, and he knows just what he bargains for. While to apply the opposite rule to it would be to say the government is to be regarded as having parted with what it in no wise sold and in no wise purported to convey.

The case of Barnhart v. Ehrhart, 54 Pac. Rep. 195, decided in August, 1898, by the Supreme Court of Oregon, affords an apt recognition of the application and reason of the rule of law which is in all fairness applicable to and decisive of the rights of the parties in the case at bar. The survey under which patent issued to Barnhart, should have had as its southern boundary Wild Horse Creek, which constituted the northern boundary of the Umatilla Indian Reservation. The survey showed as its southern boundary the meandered line of "the dry bed of a creek". The plat of the surveyed territory north of this boundary showed the division of the fractional section into lots, and patents were issued for the lots, "according to the plat" and called for the number of acres designated upon the plat.

It was subsequently ascertained that although Wild Horse Creek intersected the section lines at the points designated in the survey, it diverged, between those points, in the opposite direction from the surveyed line, thus leaving a tract of more than one hundred and fifty acres between the surveyed meander line and Wild Horse Creek. Plaintiff claimed, as appellant here claims, that a line, not specifically authorized by the statute under which the survey was made, was not entitled to recognition as a boundary or limitation of the Government's grant, and, that his title extended to the authorized boundary of the survey.

"As tending to support defendant's theory of the southern

boundary of said lots, his counsel requested the court to give, among others, the following instructions to the jury, which it refused, to-wit: "I instruct you further that if you find from the evidence offered in this case that there existed at the time of the government survey and plat of the meander line of the reservation a quantity of upland between the meander line and the channel of Wild Horse Creek, covered with a natural growth of vegetation, and such tract of land was equal to or greater in area than the adjacent lots lying north of the meander line and claimed by plaintiff, then you may consider this fact as a circumstance tending to show that the meander line was intended as the south boundary of the lots claimed by plaintiff, regardless of the location of the creek. I instruct you that a meander line is a line run by the surveyor for the purpose of determining the sinuosity of the stream and the area of the lots; and where such line in fact meanders the stream, under the laws of this state, the boundary of the lots described would be the center of the channel of the stream, and not the meander line as run on the shore. If, however, you find from the evidence in this case that there is a wide and material divergence between the meander line as run by the surveyor and the north bank of the stream, as it existed at the time of the survey, then I instruct you, as a matter of law that the meander line as run by the surveyor upon the ground, and not the stream, should be taken as the southern boundary of the lots described in plaintiff's complaint.' In making the original survey of public land bordering upon arms of the sea, lakes, and navigable rivers, the surveyor is required to run meander lines for the purpose of fixing the general average of the sinuosities of the shores or banks of such bodies or streams of water as a means of ascertaining the area of each tract the contour of which is rendered irregular by such obstacles, and from the field notes of the survey an official plat is prepared, which, when approved by the surveyor general, usually represents the meander line as the border of the water and demonstrates that the water course or body of water and not the meander line as actually run on the land, constitutes the boundary thereof. Railroad Co. v. Schurmeir, 7 Wall. 272: Hardin v. Jordon, 140 U. S. 406, 11 Sup. Ct. 808, 838. But when, for any reason, the surveyor omits to include large tracts of land lying between the meander line as surveyed or pretended to have been run upon the ground and such streams or bodies of water, the patents for the lots, though referring to the official plat of such survey for identification, are not equivalent to a conveyance of the premises to such navigable stream, lake, or bay, but are grants limited by such meander line. Fulton v. Frandolig, 63 Tex., 330; Granger v. Swart, 1 Woolw. 88, 90, Fed. Cas. No. 5685; Lammers v. Nissen, 4 Neb. 245; Bissell v. Fletcher, 19 Neb. 725, 28 N. W. 303; Glenn v. Jeffrey, 75 Iowa, 20, 39 N. W. 160; James v. Howell, 41 Ohio St., 696; Shoemaker v. Hatch, 13 Nev. 261; Martin v. Carlin, 19 Wis. 454; Fuller v. Shedd, 161 Ill. 462, 44 N. E. 286; Ayres v. Watson, 137 U. S. 584, 11 Sup. Ct. 201. Tested by this exception to the general rule applicable to the survey of public land, we

think defendant was entitled to an instruction illustrative of his theory of the case; and, this being so, inasmuch as the court did not embrace the subject in its general charge, it erred in refusing to give the first instruction requested."

Upon this subject the case of Granger v. Swart, Woolworth's Circuit Court Reports page 88 is instructive. The case was tried before Justice Miller. The point decided is well stated in the syllabus as follows: "The boundary to lands bordering on rivers and lakes is the meandered line established by the government surveyors.

"If, at the date of an entry of government land, one of the boundaries of which is such meandered line, the lake or river extends to, and borders on, such line, accretions afterward formed belong to the party holding title under the entry.

"But, if at the time the entry was made, between such line and the bank of the lake or river, there was a body of swamp or waste land, or flats, on which timber and grass grew, horses and cattle fed, and hay was cut, such land was not included within the entry".

This is our case exactly as shown by the agreed statement of facts. Throughout this marsh, while there were places where there were pond holes, and it was cut up by channels more or less, there were other portions of it that have always been so that grass might be cut upon them; just what the maps and descriptions set out, characterized them, as being lands of a marshy character, not the lake, not the bay, and not navigable waters. Upon the same subject is the case of Lammers v Nissen, et al, 4 Nebraska, 245. The second clause of the syllabus is: "Although as to public lands of the United States, a meandered line is generally considered as following the windings of a stream, yet the question whether it does so or not may be determined by evidence *aliunde*. The mere fact that it is run and designated upon the plats as a meandered line is not conclusive against the government.

"An entry of government land, bounded by a meandered line, does not include land lying at the time between such meandered line and the bank of a river".

Instead of being like ours, as showing not the lake or bay, but a marsh, in this instance, the meander line purported to be along the bank of a river; but, notwithstanding that, the court held that evidence outside the record might be shown to show that as a matter of fact the meander line did not follow the sinuosities of the river.

On page 246 of the report of the case is a plat showing the river, and showing the meander line. The party owned that lot "1" and he claimed as does the defendant here that having gotten that lot he got a mile of territory between it and the river. On page 251 the opinion proceeds: "Again another inquiry involved in the consideration of the case is as to what is the effect which a meander line, purporting to have been run along the bank of a stream, may have in regard to land at the time lying between it and the bank of a stream, and remaining unsurveyed. And in respect to

this inquiry, I think it suffieient to observe that as to public lands of the United States, conceding the rule to be well settled that a meandered line bordering on the bank of a stream, is not to be considered the boundary of a tract, but simply as defining the sinuosities of the bank of the stream and as a means of ascertaining the quantity of the land in the fraction subject to sale, yet the question whether such line does in fact define the sinuosities of the bank of the stream or not is one which may be determined by evidence *aliunde*. The mere fact that it is run and is designated upon the plats as a meandered line, certainly cannot be conclusive in the matter. To establish the doctrine that such meander line is conclusive would estop the government from disposing of lands left unsurveyed between such line and the bank of the stream; it would prevent the correction of mistakes made by surveyors in such case, and would be in direct conflict with the well settled rule of law defining what is an accretion to land."

"In Granger v. Swartz, supra, the principle is enunciated that if between the meander line, by which the government survey was made, and the bank of the river, there is, at the time, a body of swamp or waste land or flats, on which timber and grass grew and horses and cattle fed, then the patents for the lands surveyed would not cover this land, but must be continued to the actual limits of the meander line, and include no more".

The same principle is held in the case of James v. Howell 41 O. S., 696. The syllabus of that case is: "Ordinarily the meander lines run in surveying fractional portions of the public lands bordering upon navigable waters, are run, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, or lake, and as the means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser.

But when the government survey, field notes and plat show that a meander line was run as the border, or boundary, between fractional sections and a marsh, and that the solid ground between the marsh and a lake was surveyed, meandered and platted as an island, with its acerage separately computed, and marked by township and not by section, the first named meander line is the boundary of the marsh. The fractional sections do not include any part of the ground surveyed, meandered and platted as an island".

ONE CANNOT CLAIM TITLE UNDER A PATENT ISSUED PURSUANT TO A SURVEY AND AT THE SAME TIME QUESTION THE VALIDITY OF THAT SURVEY.

While the statute does not in terms provide for every detail, does not recognize the propriety of meandering lands such as these

were, while what the statute does provide for meandering is navigable waters, and the proper place for a meander line as contemplated by the statute would be upon the line of the navigable waters, the principle is as well recognized as any rule of law, that a party cannot claim under a survey, and at the same time call in question the validity or integrity of it. This defendant Gertrude Niles, claiming through a patent issued to Margaret Bailey, is claiming fractional sections; the patent issues to her for fractional sections; if there was not a survey such as the government might or could recognize there were no fractional sections to sell; this survey was either good for some purpose—or else it could not lay the foundation for any right. These subsequent purchasers are no more chargeable with notice of the limitations of the authority of the officers of the government than was Margaret Bailey the original purchaser. All alike must take notice of the law in that regard; but, if the survey was sufficient so that the proper officers might approve it, might prepare plats in pursuance of it, might put the lands to public sale under and in pursuance of that survey, and relying upon it for descriptions, and the purchaser bought and took title by patent under and in pursuance of that sort of survey, it does not seem as if it would quite lie in the mouth of that person to say that instead of a fractional section consisting of 23 or 24 acres he got a full section of 640 acres, because forsooth this line that would bound the fractional section was not surveyed in persuance of authority of law. The survey upon which appellant relies for title must either be deemed of sufficient validity to constitute a proper foundation for the action of the government officers who put the land on sale or else it was not of value to carry title. This subject came before the Supreme Court of the United States in the case of Brown v. Clements, in 3 Howard's Reports, a case dealing not with navigable waters but with previously acquired private rights. A plat in connection with the case shows the entire section and shows in the north west quarter, north east quarter and south east quarter the parts of the section that had been disposed of by a private right acquired in them prior to the survey. A survey was made and a portion of the section undisposed of consisting of the south west quarter, the southerly part of the north west quarter a portion of the south west corner of the north east quarter and the westerly part of the south east quarter, containing in all 203 17-100 acres. The surveyor general divided that so as to put 92 and 67-100 acres in the west fraction and 110 and 50-100 acres in the east fraction which was so held and patented, but the patent instead of describing the west 92 and 67-100 as being the south west fraction of the section or as the west fraction of the south part of the section, described it as the south west quarter of the section, containing 92 and 67-100 acres and then a separate patent issued for the other 110 and 50-100 acres; the party who thus had the patent describing the southwest quarter as containing 92 and 67-100 acres claimed that the government authorities had no right to limit him to less than the quarter section. The tract was in such shape that an entire quarter section could

be aparted out of it but left the other fractions in bad shape for disposition. The surveyor general supposed he had a right to divide it as he did. A majority of the court held the party entitled to the entire quarter; that the 92 and 67 100 acres although purporting to be the quantity were not controlling, that in the patent describing the quarter section he took the entire quarter section. Three judges dissented, and in the 20th Howard, the case of Gazzam v. Phillips, et al, page 372, the question again came before the court with the result that the court unanimously followed what had been the dissenting opinion, in the last case, and held it did not lie in the mouth of a patentee to impeach the integrity of that survey, and that he took nothing beyond the subdivision as shown upon the plat containing the 92 and 67-100 acres. So that the rule laid down in the dissenting opinion in Brown v. Clements in 3rd Howard became the unanimous opinion of the court in the case of Gazzam v. Phillips, and is followed in subsequent cases. There are two cases in 158 United States Reports following this case in 20th Howard, the first is Stoneroad v. Stoneroad, 158 United States Reports, page 240, and the next is Russell v. Maxwell Land Grant Co. in the same volume, page 253. The syllabus of this last case is as follows:

"A survey made by the proper officers of the United States, and confirmed by the Land Department, is not open to challenge by any colatteral attack in the courts".

So then we may, for the purpose of argument, concede that there was no affirmitive authority in the statute for a meander line as the term is commonly known upon this margin of this marsh, and yet that does not help the case of this appellant at all because the principle is still applicable to her patent, the rule of construction applicable to it, that she takes by her patent what it purports to give, and that she cannot claim the validity of the patent, the validity of the survey, for the support of the patent, and that it is invalid as a limitation to prevent her claiming beyond and outside of the patent. The same rule is adhered to in a still later case, that of McCormick v. Hayes, 159 U. S. Reports, page 332, and the syllabus is as follows:

"In an action in which the plaintiff claims title under the act of September 28th, 1850, Chapter 849, Stat. 519, granting to the several states the swamp and overflowed lands in each unfit for cultivation, and the defendant claims title under the act of May 15, 1856, C. 28, 11. Stat. 9, making a grant of lands to the State of Iowa to aid in the construction of railroads, parol evidence is inadmissable to show, in opposition to the concurrent action of the Federal and State officers having authority in the premises, that the lands in controversy were, in fact, at the date of the act of 1850, swamp and overflowed ground. It is the recognition of the same principle that a party cannot be heard in the courts to attack collaterally the action of the departments of the government and their authority and jurisdiction to determine these matters. This survey when made went to the proper officers of the government to be there approved or disapproved by them, if disapproved the

result would be, of necessity, either the resurvey or the correction of that thing wherein the officers charged with the matter found the survey or the report of it not to be such as they could approve. On the other hand, when they did approve it and proceeded to act under it and patents issued under it, it is not a question for the courts, and of which they have cognizance to reverse the action of the land department authorities in those regards."

The designation on the map of this unsurveyed land as a marsh expressly excluded it from the category of lands so covered by navigable water as should be omitted from survey and sale by the U. S. government. It was unmistakably distinguished from both the bay and the lake, and there was no chance for misapprehension because the plat so designated it. The shore line is indicated as well of the bay as of the lake. But even if this had, by mistake, been designated as a part of the lake instead of as a marsh, it would not have helped the claim of the defendant in this regard. Upon that subject we refer to 75 Iowa Reports, page 20, the case of Glenn vs. Jeffery, et al: The second clause of the syllabus is as follows:

"A certain lot was surveyed and platted and located on the north side of a certain water supposed at the time to be the Missouri river; and the government plat and field notes described the meander line as being at said river, but the water was, in fact, a bayou some distance from the river, and between it and the river was land which was never, in fact, surveyed. Held, that the patent for the lot did not convey the land between the bayou and the river."

The opinion of the court on page 21 is as follows:

"The evidence warranted the court in giving the instruction it did. There was no controversy as to the facts. It is true that the government plat and field notes described the meander line as being at the Missouri river, and therefore it is claimed that lot 3 extended to the river. In fact, however, instead of running the meander line along the river, it was run along a bayou some distance from the river. The land in question cannot be regarded as accretion, but existed as it now does when the survey was made. The court rightly directed the jury to find for the defendant. The land never was, in fact, surveyed by the government, and never sold or conveyed to the plaintiff. It is true the meander line is not a boundary line and if the evidence in this case showed that the river had been meandered, this case would be like the case cited; but there is a material distinction between them. In the case cited the river had been meandered and the land in controversy had been formed by accretion since the survey and the sale of the land by the government. It is not claimed in this case that this land has grown up there by changed conditions or anything of that sort, but the claim seems to be that these fractional sections had to find water somewhere and to be extended far enough to reach to the water."

The undertaking of the appellant to support her claim by some application of the doctrine of riparian right, would be

applicable if this purported to be or was, in fact, a meander of navigable water, a meander line, such as the statute contemplates, might properly be made merely for the purpose of ascertaining the quantities, and treating the water line as its constituted boundary; there is, however, an utter absence of anything here showing such a state of affairs as would warrant any surveyor thus dealing with it in making the survey, or any purchaser supposing that was the sort of right the government was giving by its patent. In the case of Grant vs. Hemphill, 59 Northwestern Reporter, page 233, an Iowa case, it is held as follows:

"An owner of lots on a meander line, which was supposed to separate such lots from a lake which, in fact did not exist, does not own the land covered by supposed lake, but it is a part of the unsurveyed domain of the United States."

He claimed that at least he was entitled to have a full section, but it was held that he got just what his patent described to him; and the doctrine was recognized that he could not be held to claim the validity of the survey as the foundation of the right that was given to him by his patent, and call its validity in question as a foundation for claiming more than the patent gave him. The case of Bates vs The Illinois Central Railroad Co. in 1st Black Reports 204, is also an instructive one upon this subject. In that case the survey and plat gave as a boundary line the mouth of the Chicago river, and the patent stated what the quantity was, and was in form as these are; and it appeared that the mouth of the river was at such a point as would include a much larger quantity of land within the boundaries than the quantity stated in the patent and the description; but it also appeared that there was an opening into the lake at that point, which might have been treated by the surveyor as the mouth of the river, and the court held that for the purposes of the survey that was the mouth of the river and the patent could not go beyond that line.

A still later case following this same doctrine is the case of Horn vs. Smith, 159 U. S., page 40, the syllabus reads this way:

"In this case the United States surveyors obviously surveyed the plaintiff's lot only to a bayou, which they called the Indian River, leaving a tract between the bayou and that river unsurveyed; and the plaintiff has no right to challenge the correctness of their action, or to claim that the bayou was not the Indian river or a proper water line on which to bound the lots."

The opinion of the court in that case might well be made a part of this brief, constituting, as it seems to us, an exhaustive and complete refutation of the theories urged on behalf of appellant.

In that case the bordering unsurveyed territory, between which and the surveyed premises the meander line ran, was designated as Indian River.

The natural boundary, which the meander line and plat thus indicated, was, however, subsequently found to be of that which the court, in its opinion, designates as bayou, or savannah, using those terms interchangeably, as either thereof being properly

descriptive of the territory referred to, and the water line of which was held by the court to constitute a boundary, the validity of which, the party claiming by patent in pursuance of the survey, would not be heard to dispute.

Webster defines "savannah" as "a tract of level land covered with the vegetable growth usually found in a damp soil and warm climate—as grass or reeds—but destitute of trees."

This boundary the court held to constitute the limit of the grant, although the patent referred to the plat, which designated the river as the boundary.

If the meandering of the water line of a savannah, and, upon the survey and plat, giving it the name of a river, to which it is adjacent, serves to limit the grant of a patent issued in pursuance of such survey, with what reason or propriety can the validity of such boundary or limitation be questioned, where the plat and field notes correctly designate the adjoining, bounded and meandered, but unsurveyed territory, as "savannah" or "marsh," and in turn designate more remote unsurveyed territory, as "lake" and "bay," respectively.

CASES CITED BY APPELLANT.

Without rehearsing in detail the questions adjudicated or points decided in the several cases presented in appellant's brief, and not herein above referred to, it is sufficient to say that none of them either support the views necessary to her defense nor at all controvert those herein contended for by appellee.

Palmer vs. Dodd, 64 Mich., 475, was unlike the case at bar in that the survey in no wise distinguished between the area of the marsh and that of the lake; Stone vs. Rice, 121 Ind., 53, was a dispute of title to land underlying a lake and not a marsh; Schlosser vs. Crookshank, 65 N. W. Rep, 344 (cited by appellant as 65 Iowa, 34), merely holds that where the meander line and the lake line are not identical the high water line of the lake is the line of the land included in the grant; in attempting to state the holding of the court in Whitney vs. Detroit Lumber Company, 78 Wis., 240, appellant's counsel must have unwittingly gotten the remedy sought and that adjudged very much muddled for the latter was the exact contrary of what the counsel states it; the case, however, is totally unlike this one in that there a manifest grave error had occurred, for there was no lake in the subdivision to fit the supposed meander line; whereas, here the water line of the marsh at time of survey was identical with the surveyed line, the legal effect of which is in dispute. The court held, against the plaintiff's contention, that he could not extend his grant beyond the smallest government subdivision to reach the lake.

If and so far as one derives title by or under governmental authority to land situate within an organized state and underlying either body or stream of navigable water, such title is acquired from and the immediate ancestor in title is the state and not the United States.

If by the state policy ownership of land abutting a navigable stream be deemed to draw to it or carry with it, as incident to such riparian proprietorship, title extending to the thread of the stream, such doctrine of extension of title confers the title of the state, and not of the United States.

It is clear, then, that where the contention is as to whether ordinary high water mark, or the thread, or center line of the stream, is to be deemed the boundary, the question presented for adjudication is not in any sense whether the meander line, if there be one, or the high water mark margin, or thread of the stream, constitute the boundary line of the land patented; but, rather, what, if anything, of the state's ownership and title, outside of and abutting the land patented, of land underlying the stream of navigable water, shall, under the policy of the state, be deemed to inhere and vest in the riparian proprietor as incident to such proprietorship.

The cases of Gavit vs. Chambers, 3 O. R., 495, and June vs. Purcell, 36 O. St., 396, merely announce the rule of state policy as to ownership of land underlying navigable rivers; and in no way involve that of the effect of a surveyed line identical with that of the margin of a "flag marsh."

SUCH RULE NOT APPLICABLE TO A MARSH.

The ground of distinction and the consequent difference of doctrine applicable to a navigable river line and a marsh line is thus stated by the Supreme Court of Ohio, in the recent case of Railway Co. vs. Platt:

"The ground in controversy is insusceptible of absolute and unqualified dominion, being incidental to the shore and subject to the public right to navigate the stream. Because of the permanent character of the riparian and public rights involved, the case is broadly distinguishable from those of grants bounded on streets and highways which may be abandoned, and their sites thus restored to a condition in which they may be subject to absolute and unqualified dominisn. For the same reason the case is distinguishable from those of grants of lands bounded by swamps, ponds and lakes that are not navigable and are subject to drainage."

53 Ohio St., 254.

THE CASE MADE BY COMPLAINANT ENTITLES IT TO RELIEF IN A COURT OF EQUITY.

In support of our contention that the case presented is such as entitles the complainant to relief in equity in the state courts, we invite the attention of the court to a recent decision of the Supreme Court of Ohio, wherein the syllabus thus sets forth the point decided:

"Where numerous acts are being committed, and their continance threatened, under a claim of right, by one person on the land of another, each which act constitutes a trespass, and the injury

resulting from each act is, or would be, trifling in amount as compared with the expense of prosecuting actions at law to recover damages therefor, the owner may resort, in the first instance, to a court of equity for appropriate relief."

Lembeck vs. Nye, 47 O. St., 336.

To like effect is the doctrine as stated in

High on Injunctions, Sec. 700, et seq.

Beach on Injunctions, Sec. 1136,

and cases cited by these authors.

IN CONCLUSION.

We feel warranted in saying with the utmost confidence, that the authorities above cited and quoted, sustain beyond cavil every proposition incumbent upon the appellee herein, complainant below, to maintain, to entitle it to have in the Federal Courts the relief and decree by it prayed for, and to the decree rendered in its favor by the Circuit Court, and affirmed by the Circuit Court of Appeals.

Respectfully Submitted,

POTTER & EMERY,

Solicitors for Appellee.

Thomas Emery
of counsel

Office Supreme Court U. S.
FILED
NOV 15 1899
JAMES H. MCKENNEY,
Clerk

No. 80.

Sup. Ct. U.S. October Term 1899

Filed Nov. 15, 1899.

Supreme Court of the United States

October Term, 1899.

No. 80.

GERTRUDE J. MILLS, Appellant,

v.

CEDAR POINT CLUB, Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

THOMAS KEENY,
Of Counsel.

POWERS & KEENY,
Solicitors for Appellee.

Supreme Court of the United States

October Term. 1899.
No. 80.

GERTRUDE J. NILES, Appellant,

v.

CEDAR POINT CLUB, Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

By way of addenda and supplemental to its brief heretofore filed herein, appellee submits the following propositions and athorities cited in support thereof:

1. That the survey and plat referred to in the patents issued to appellant's ancestors in title are by such reference made a part of the patent as fully and the same to all intents and purposes as if embodied in such patent.

This rule, manifestly correct in principle, is recognized and followed in a recent decision of the Supreme Court of California in the language following:

"The action was brought to recover the possession of certain land. The plaintiff is the owner, by title derived from the United States government, of the southeast quarter of section 13 in township 11 north, range 9 west, Mount Diablo base and meridan, and the defendant Polack is the owner of the northeast quarter of the same section. The official plat of the approved survey of the township located the premises in controversy in the northeast quarter of the section. The patent under which the plaintiff claims, describes the land conveyed as the southeast quarter of the section, 'according to the official plat of the survey returned to the general land-office by the surveyor-general". *Held*, that neither parol evidence nor a private survey was admissable to show that the premises in controversy were situated in the southeast quarter of the section.

"A map of a tract of land, having lines drawn upon it marking the boundaries and the natural objects upon its surface delineated, which is referred to in a deed containing a description of the premises therein conveyed, is to be regarded as giving the true description of the land conveyed, as much as if it was expressly recited and marked down in the deed itself.

Chapman v. Polack, 70 Cal. 487.

This Rice survey, field notes and map showed beyond question that the so called meander line bounding the survey upon which these patents were founded, was not the margin of any lake or bay or other body of water, but of a marsh; and that between such meander line and the lake there was a body of land varying from approximately a quarter of a mile to a mile and a half in width, which at times of exceptionally high water was properly designated as impassable water and marsh, but at its worst, clearly distinguishable from the lake and bay respectively adjoining the marsh.

2. That in order to entitle one to claim title by accretion or reliction, the burden is upon such claimant to establish that by the one or the other process a surface which was once a body or part of a body or stream of water has become land, and that he, or his ancestors in title by reason of ownership to the pre-existing shore was such riparian proprietor as that by reason of such proprietorship the thus created land constitutes an addition to his estate.

The change of character of which the law takes notice and upon which by its rules rights of ownership attach, has reference to substantial permanency. That is to say, such rule is not incident to mere temporary or perodically recurrent conditions existing either prior or subsequent to the change of character claimed. Such right does not attach to property whose natural or previously existing condition was that of being with more or less frequency submerged, but having the characteristics of swampy or marshy land, merely because it has become subject to submersion less deeply or less frequently. Nor to that which has been subject to such submersion as to properly constitute it a body of water, as a lake or pond, merely because during certain seasons of the year, or during exceptionally dry years the body of water may temporarily disappear and the land during such exceptionally dry season or years produce valuable herbage or vegetation. It is the substantially permanent condition that fixes character, and changed substantially permanent condition that must be shown to exist as the basis of any right that shall be claimed to attach to it incident to or consequent upon the change.

An instructive case upon this question is that of Sapp v. Frazier, decided by the Supreme Court of Louisiana, April 3, 1899. The case presented and the rules of law deemed controlling are thus stated in the opinion of the court, announced by BLANCHARD, J:

" Plaintiff, in 1896, acquired by purchase certain tracts of land fronting on Lake Bistineau, aggregating about 220 acres. The authors of his title had acquired the land from the United States. It is 'hill' land or 'uplands'. When, many years ago, the government surveyors ran the lines of the townships, and sectionized the lands of that region of the country, the tracts of land in question formed fractional sections, or parts of fractional sections. What necessitated these fractional sections was the existence of the lake and its omission from the survey. The front, or eastern and northeastern, sides of these fractional sections made a meander line, running around the west bank of the lake. Between the meander line and the other, or straight, lines of the fractional sections, the govern-

ment computed so many acres, and disposed of the land according to such computation. Lake Bistineau is a body of water situated in northwestern Louisiana, forming the boundary line between the parish of Bienville on the east and the parish of Bossier on the west, and extending up into the parish of Webster. The lake is 30 or 40 miles long, and from 1 to 2 miles wide. At its northern extremity Bayou Dorcheat flows into it, and through Loggy Bayou, at its southern extremity, the lake drains into Red River. The three (Loggy Bayou, Lake Bistineau, and Bayou Dorcheat) constitute a waterway of the United States, to improve which congress has repeatedly made appropriations of money, and through which steamboats approach within a few miles of the town of Minden, the county seat of Webster parish. Navigation through the lake for steamboats begins in January or February, and extends, through the spring months, into the early summer. The lake bed is covered with water from six to seven months in the year, and for five or six months, beginning in the summer, and extending through the autumn season, the greater part of its bed is uncovered, the waters receding and draining off into Red River. During the season when the water is down, what is called the 'low water channel', having the appearance of a small bayou, meanders through the bed of the lake. Through this drains the surplus water remaining in the lake, and that which comes into it from the summer and fall rains. Sometimes the water in this channel runs—there is a current—and sometimes there is none. * * * * * About 12 or 15 years ago a new kind of grass began to grow upon the lake bed immediately following the annual subsidence of its waters. This grass grows to a height of two or more feet, and so thick that it chokes out and destroys the cocklebur and other weeds and grasses where it appears. It is an excellent forage grass. Cattle graze and fatten upon it, and it was soon discovered that hay made from it was better than the best the market afforded. The result was that the people of that section of country began going upon the bed of the lake at the season when the grass was in condition, and cutting and bailing the hay, both for their own use and for market.

"At the point where the land which plaintiff's titles call for borders the lake, the latter is nearly two miles wide, and there this grass, so much in demand, seems to grow to the best advantage. Hence it was, and is, a favorite locality of the grass cutters, and, before plaintiff acquired his holdings, defendants and other persons were in the habit of cutting much hay there. Indeed, plaintiff seems to have been lured to that particular locality of the lake by the advantages mentioned and his investment in the uplands bordering the lake there induced by the same. He believed that, by acquiring the lands fronting on the lake he would take, as riparian proprietor, to the center of the lake bed, or to the low-water channel. He seems to have been the first to assert a right of this kind. Having purchased and taken possession, he announced his purpose to claim the right of ownership and of dominion to and over the lake bed in front of his holdings. Defendants Frazier and Noles, who lived near by, and who had been cutting grass there for several years,

were preparing to do so again in the summer following the purchase of plaintiff. They were on the ground with bailing press, mowers, etc., and had cleared away the bushes, erected a small cabin for shelter, and cut some hay. Plaintiff appeared, claimed the ground and the grass, forbade further cutting by defendants, caused one of them to be arrested for trespass, and then brought the present action to restrain them by writ of injunction from going upon that part of the lake bed or cutting grass there. In his petition he claims the ownership as riparian proprietor, by right of accretion or accession, of all the lake bed to the low-water channel in front of his land situated on the hills bordering the lake, and his prayer is that he be decreed the owner thereof, and the injunction be perpetuated. * * * * *

"The first inquiry arising is: Do plaintiff's titles, by their terms, embrace and include the land in the lake bed where defendants were cutting hay? They do not. There is no pretense that they do. The next inquiry is: Has there been formed, in front of his land bordering the lake, other land, either by accretion or dereliction, in the sense of the law, and susceptible of ownership; and, if so, when did it form; and, if formed prior to his purchase, did his vendors include the same in the sale to him? If the lake bed in front of his land comes under the denomination of neither accretion or dereliction, then it would seem that plaintiff has no right to fence defendants off such lake by either injunction, or rail, or wire. In the view we take of the case, it is not necessary to decide whether or not plaintiff has riparian rights as owner of the lands bordering the lake, nor whether or not the doctrine of 'limited fields'—'in agris limitatis' of the Roman law—applies to the titles by which he holds. Neither is it necessary or advisable, for us to inquire into the rights, if any, in and to the bed of the lake, appertaining to the United States or to the state of Louisiana; whether such bed does or does not attach to the public domain of the one or the other; whether or not the same is or is not susceptible of disposition under existing laws, by the one or the other, through their respective land departments; or whether or not congress in the one case, or the general assembly in the other, could otherwise dispose of same by legislative act. If we view plaintiff as owner of lands on the lake to which riparian rights may attach, does he take the lake bed in dispute as alluvion or reliction? From the definition of the word, 'alluvion' is the land formed by sedimentary deposits, and added to an ordinary tract by the imperceptible action of the waters bordering the latter. It is a mode of acquiring property by natural law, —'jure gentium,'—by those principles or maxims which regulated the conduct of men before the formation of civil society (Morgan v. Livingston, 6 Mart. [La]. 242), and is recognized by the statutory law as a means of the acquisition of property (Civ. Code, art. 509). 'Dereliction' or 'reliction,' is land added to a front tract by the permanent uncovering of the waters,—the laying bare of the bottom by the retirement of the waters, as contradistinguished from the building up of the bottom by deposits causing the waters to recede. 'Dereliction' as used by the English law, meant when the

sea shrank back below the usual water mark, and remained there. In those cases the law (English) is held to be that, if this be by little and little, it shall go to the owner of the land adjoining. Morgan v. Livingston, 6 Mart. (La.) 244. It is recognized (excluding the sea) by the Louisiana law as a mode of acquiring property. Civ. Code, art. 510. But the mere temporary subsidence of the waters, occasioned by the seasons, coming in the winter and staying through the spring, going in the summer and gone through the autumn, does not constitute dereliction, in the sense of an addition to the contiguous lands, susceptible of private ownership as riparian rights. There is no 'increase of the land' in such case. The reliction must be from the waters in their usual state. Where it periodically rises up over the land, and then recedes, there is no reliction. Bouv. Law Dict. verbo 'Reliction;' Milne v. Girodeau, 12 La. 324; Zeller v. Yacht Club, 34 La. Ann. 839.

The lake bottom, where defendants were preparing to cut grass, cannot be said to be accretions, or alluvion, in the sense of the Code; for the testimony shows no alluvial or other deposit whatever has been made there for 40 years, or as far back as any of the witnesses who testified in the case had knowledge of. It cannot be dereliction; for the same witnesses testify to no change in the bottom of the lake, and no change in the characteristics of the lake, for 40 years. There has been no dry land formed by 'running water retiring imperceptibly from one of its shores and encroaching on the other'. Civ. Code, art 510. There has been no change in the shores of the lake. Its banks do not and have not caved. Nothing has been taken from one shore and added to the other. There has been no permanent uncovering of the waters, no laying bare of the bottom by the retirement of the waters to stay, and no shrinking back of the waters below the usual water mark, and the remaining of the same at the point of shrinkage. It is true its bed, or a large part of it, becomes measurably dry, and remains so, more or less, for four or five months in the year. But it becomes covered again with water, which remains over it for six or seven months, and in turn runs off, leaving the bed exposed, and this successive recurrence of conditions has been going on without any change from time immemorial. There has been no decrease in the depth of the water (from six to ten feet), covering the hay field in dispute, except such as might result from a larger volume of water filling the lake one season, and a less volume another season. But this is more or less an accidental fluctuation, depending on the rainfall of one season exceeding that of another, and the water in the Red River being higher one year than the next, or vice versa. * * * * * * There has been no increase of land, whether by alluvion or dereliction, between the tract occupied by plaintiff and the lake, since the date of his purchase; and there was none before. Therefore, under the law of Louisiana, there has been nothing for him to take, even giving him the benefit of the pretensions he asserts as riparian proprietor. The modes or ways of the acquisition of property are limited to those prescribed by law. Zeller v. Yacht Club, 34 La. Ann. 839. He must be held to have had no greater right to the

portion of the lake bed in dispute than defendants had, and no more right than they to cut grass there. It follows that no sufficient cause for the injunction herein sued out existed, and that the same was properly dissolved".

Sapp v. Frazier, 26 Sou. Rep. 378.

Like considerations constituted the basis of determination of a case very recently decided by the Supreme Court of Oregon, the point involved being stated in the syllabus, thus:

"In an action to recover possession of lands, where plaintiff, being owner of lots abutting on the meander line of the lake as shown by the government survey, claimed the lands in question outside of such line by reliction, and there was a question whether a lake existed in front of the lots at the time of the survey or since, instructions that the fact there may have been a meander line along the boundary of the lots is not conclusive evidence of the existence of a lake, and the jury must determine whether there was a lake adjoining said lots, and, if there was no such lake, they must find for the defendant, are proper."

And is more fully set forth in the opinion of the court, announced by WOOLVERTON, C. J.:

* * * * "Now the plaintiff sought to sustain the fact of the actual existence of the lake in front of its lots, and upon which they abutted at the time after survey, and then to show a gradual subsidence of the water of the lake, due to the cutting of the channel, from natural causes, through a narrow reef or ridge extending across between Malheur and Harvey lakes, by which water of the former was drawn off into the latter, and a consequent reliction of the land bordering said lots, which constitute the land in dispute and to which plaintiff claims title. The defendant controverted this position and sought and introduced evidence tending to show the non-existence of the lake at the time of the survey and at all times since; in short, there was support for the whole of his contention. The fact of the existence of Malheur Lake, a non-navigable body of water, was admitted, but there was evidence to show that it lies to the northeast of the lots of plaintiff, and that no part of it now or at the time of the survey extended westward in front or to the north of them. Several witnesses testified, in effect, that there was no open body of water of any moment in front of the lots; that the land was low and flat; that a portion of it was of a swampy or marshy character, but much of it—perhaps the greater portion—was dry, and not covered with water, except at certain seasons of the year, when the water was unusually high, and that it was the same character as some of the land that is comprised within the boundaries of said lots, and that this condition of affairs has existed since prior to the survey of 1877. Many circumstances were related tending to support the truth of the testimony. The issues of fact were clear and distinct, and, having been submitted to the jury there is no reason why their verdict should not preclude the plaintiff as in other cases where a jury has passed upon a submitted question of fact. If it be said that the result is a collateral impeachment of the government survey, the answer is decisive that the government ought not to be

precluded by a meander line which does not approximately and by general average border the banks of the stream or the shores of the lake which it is the purpose of a public survey to meander. If there was no lake to meander, the purchaser could not have bought upon the representation of the government that there was, and cannot become a riparian owner, and therefore can claim none of the rights appurtenant thereto. So, turn the matter which way we will, the facts do not present a case which, under the usual reasons assigned will preclude the government or its grantees. The result, that the plaintiff should acquire by the purchase of these lots several multiples of their area, as was remarked by Mr. Justice Brewer in his dissenting opinion in Mitchell v. Smale, supra, (140 U. S. 406) is 'certainly suggestive', and the case ought to be a clear one to support and sustain it. The instructions to the jury were in accord with the views here entertained, and hence there was no error in giving them".

French, etc. Co. v. Springer, 58 Pac. Rep., 102.

That ownership to the margin of the lake, and not merely to that of flats, swamp or marsh intervening between the survey and the body of water, is necessary to constitute one a riparian proprietor is well illustrated by the case of Sweringen v. St. Louis, recently decided by the Supreme Court of Missouri. The case presented is thus set forth in the syllabus:

"Where claimant's lands are separated from accumulated accretions by the land of another, however, narrow the intervening strip may be, or whatever the size of claimant's tract behind it, the accretion does not belong to the claimant.

"The boundary of a patent was a permanent line, fixed by metes and bounds, between high and low water mark. The accompanying survey showed a tract of several acres between the boundary of the survey and the river. *Held*, that any accretion to such strip between the river and the survey did not belong to the owners of the survey."

And in the opinion of the court, anounced by GAUTT, P. J.:

* * * * * "The tract in this case was confirmed, not only by fixed boundaries other than the river, but the exact number of acres was specified within that survey, and that survey, as to its quantity, excludes all idea that the United States was granting the 14 or more acres lying outside of that survey at the time it was made. The surveyor, moreover, says that Soulard's survey did not describe the meanders of the Mississippi, or of Rocky branch, and it was impossible to determine whether the difference in area was the result of miscalculation by Soulard or by the accretions; but whatever the cause of the discrepancy, the United States confirmed the last survey, which nowhere calls for the river as a boundary, and by that patent all these questions must be held to be forever settled. Our conclusion is that, as Labeaume was not a riparian owner, his heirs or grantees cannot recover the tract in suit as an accretion."

Sweringen v. City of St. Louis, 52 S. W. Rep., 346.

Another illustration of this is the recent decision of the Supreme Court of Nebraska, announced by NORVAL, J.:

"This is an action of ejectment brought by Willis Harrison to recover possession of certain real estate in fractional section 8, in township 12, north, of range 14 east, in Sarpy county.

"The defendants in their answer admit that plaintiff is the owner of forty acres of the lands described in the petition and disclaim any title to or interest therein, and deny that plaintiff has any title to the remainder of the lands.

"After the parties had introduced their testimony, the court instructed the jury to return a verdict for the defendants. Judgment was rendered upon the verdict in favor of the defendants, to reverse which plaintiff prosecuted error.

"Did the court err in taking the case from the jury? This must be answered in the negative, unless the evidence before the jury was sufficient to have warranted a verdict for the plaintiff. There is no conflict in the testimony. The plaintiff on the trial established a complete chain of title from the government of the United States to himself to an irregular tract, containing forty acres, being the same to which the defendants filed a disclaimer. The plaintiff seeks to recover a large quantity of land lying between the boundary of the forty acre tract and the present channel of the Missouri river, the claim being that said land is an accretion to his forty acre tract.

It appears that said fractional section 8 was surveyed by the United States in 1856. The east and south boundaries of the section consisted of a meander line near the west bank of the Missouri river. The certified copy of the field notes made by the United States surveyor of said survey were introduced in evidence, from which it appears that there was a strip of land between this meander line and the channel of the river. It further appears from the testimony of plaintiff's witnesses, and we fail to find any evidence in the bill of exceptions to the contrary, that the original survey did not extend to the river, and that the strip lying east of the meander line was covered with a growth of willows and cottonwoods at the time of the survey. While the testimony shows that this land was occasionally subject to overflow, yet it also appears that it lay above the usual stage of water in the river. Since said survey, and after the patent was issued for the forty acres, the channel of the river has changed further east a considerable distance. The plaintiff's claim to any portion of the strip lying between the meander line and the present channel of the river is not well founded for the reason that it is not an accretion to plaintiff's land. The case falls within the rule announced in Lammers v. Nissen, 4 Neb. 245, where it is held that 'an entry of government land, bounded by a meander line, does not include land lying at the time between such meander line and the bank of the river.' To the same effect is Bissell v. Fletcher, 19 Neb., 725. We are satisfied that the evidence would not have warranted a verdict for the plaintiff. The court therefor did not err in directing the jury to return a verdict for the defendants. The judgment is affirmed. The other judges concur.

Harrison v. Sipes, 34 Neb., 431.

And to like effect is the decision of the Commission of Ap-

peals of the Supreme Court of Texas, wherein the opinion, reciting the facts presented, is anounced as follows:

WATTS, J., Com. App.—"There is no doubt but that land formed by gradual and imperceptible accretion, as well as that formed by the gradual and imperceptible receding of the water, belongs to the owner of the contiguous land. In this respect there is no distinction between land gained by accretions and that gained by the recession of the water. New Orleans v. United States, 10 Pet.; 662; County of St. Clair v. Lovington. 23 Wall., 46; Perry v. Pratt, 31 Conn., 442; Barrett v. New Orleans, 13 La. Ann., 105; Handly v. Anthony, 5 Wheat., 374.

"It is also true that the right to Alluvion depends upon contiguity; the accretions belong to the land immediately adjoining the water, however narrow it may be, and without regard to the size of the parcel behind it. Bates v. Illinois Central Railroad Co., 1 Black, 204; Saulet v. Shepherd 4 Wall., 502; Posey v. James, 7 Lea (Tenn.) 98; Bristol v. Correll county, 95 Ill., 84; Beaufort v. Duncan, 1 Jones (N. C.), 234.

"According to the finding of the court, in making the original survey the surveyor actually run the lines upon the ground according to the calls for course, distance and meanders of the bay front. At that time there was a shell reef extending from the boundary line of the survey made for Smith, assignee of Crocroline, to the south southeast about a half mile, varying in width from twenty feet to fifty or sixty yards, and in elevation from a few inches to six or seven feet. At the southeast extremity of this shell reef there was some low marshy land. That at the point where the line run by the surveyor in making the Smith survey crosses this reef, it was then about twenty or thirty feet wide.

"From this finding it will be seen that all that part of this shell reef lying to the south southeast of the boundary line of the Smith survey, running along the general front of the bay, was not included in that survey, and it may be assumed belonged to the state as unappropriated public domain.

"Now the accretion in controversy immediately adjoins and is contingous to this shell reef lying to the southeast of the Smith survey. This accretion is not contingous to the Smith survey, as claimed. But it seems that by gradual and imperceptible recession of the water, and by gradual and imperceptible deposit, a considerable body of land has been formed immediately contiguous to the shell reef, in the form of a small peninsula, the reef being the basis of the deposit and reliction.

"From these facts it will be readily seen that the made lands do not belong to the Smith surveys, but originally the state, and now the appellee, if he has secured the state's title, is the owner.

"The real point contended for by appellant is that as the calls of his grant are for the meanders of the bay according to certain calls for course and distance, that in the conflict the latter must yield to the former, and that being true, the Smith survey must be considered as embracing the shell reef.

"But it should be remembered that the actual survey as made

upon the ground, if it can be found and identified, controls. As is frequently said, the real object in applying the various calls is to find the footsteps of the surveyor. Where these are found and identified all classes of calls must yield to them.

"Here the court found, and upon sufficient evidence, that in making the Smith survey the surveyor in fact ran across the shell reef according to the call for course and distance. Hence according to the lines as actually run upon the ground, this shell reef, to the south and south east of where the line crossed it, was not included in the Smith survey.

"Our conclusion is that there is no error in the judgment, and we recommend its affirmance."

Fulton v. Frandolig, 68 Tex.,330.

In the case entitled state of California, et al, v. United States, et al, 24 Land Decisions, 68, which came before the Commissioner of the General Land office, and by appeal before the Hon. Secretary of the Interior, the question presented and decided by the latter, on January 30, 1897, is by the syllabus thereof fairly set forth in the following language:

"Where it is apparent from the record that in the survey of a township, a large body of land adjacent to a navigable lake has been omitted from actual survey, through the establishment of a meander line between alleged swamp and dry lands, instead of at the true shore line of the lake, a survey of the lands so omitted should be made.

"The claim of a state under the grant of swamp lands must fail if it does not appear that the lands were of the character granted at the date of the grant."

From the Hon. Secretary's opinion we quote as follows:

"The state of California and the swamp land claimants have not appealed; and to that extent at least they seem to have acquiesced in the decision of your office, and to abandon all claim of the lands in question under the acts of September 28, 1850, and July 25, 1866 (14 Statutes 219). This conclusion is placed beyond all doubt by the fact, that the swamp land claimants have employed special counsel to resist and oppose the homestead settlers' appeal. On page 2 the brief filed by said counsel it is said:

"The present brief is filed on behalf of John A. Fairchild and others, who are owners of tracts adjoining a portion of the land in controversy, and who seek an affirmance of the Commissioner's decision establishing their title as riparian owners.

"The plaintiffs manifestly expect, under color of riparian rights as recognized and enforced by your office decision, to accomplish the same practical results that they had hoped to attain by their petition as swamp land claimants. * * * *

"In the month of July, 1874, when United States deputy surveyor Alexander McKay made his survey of said township, he ran and established a meander line to mark the boundary between the 'plateau' of arable public land and the lands which he considered swamp and overflow and unfit for cultivation.

"The face of the map itself, and the application to the

map of the calls of the field notes of the meanders of the swamp and lake, respectively, show that in 1874 and 1879 there was in existence, uncovered and visible to the eye, a body of land called 'swamp' by the surveyors, and containing by estimation 7,080.69 acres, which was carefully segregated from the arable land and from the lake, by the inner and the outer meander lines delineated and described.

"It is plain that the pharse 'inner meander line' was understood by all parties to mean the meander line between arable land, on the one side, and swamp and overflowed land unfit for cultivation, on the other; and that the phrase 'outer meander line', meant the line along the shore of the lake proper, close to the water's edge, separating the water of the lake from the swamp and overflowed land.

"On February 4, 1880, the surveyor general furnished the new plat or map 'constructed in accordance with instructions'. It shows only the arable public lands which had been actually surveyed. The lines of the survey were closed upon the 'inner meander line', separating the arable from the swamp lands; and the fractional subdivisions thereby made necessary, were divided into lots and numbered. The new plat and the first plat were bound together in Volume 27 of the official maps of California, and thus remain of record in your office jointly as a delineation of the township. They show conclusively that none of the lots surveyed and numbered therein abut upon or adjoin Little Klamath lake, except lots, 4, 5 and 6 in section 25, which have not been disposed of by the United States.

"A further examination of the records of your office shows that only four patents have been issued for said lots, as follows:

"On May 6, 1887, to Jerome Churchill for lots 1, 2, 3, 4 and 5 of section 18 and lot 2 of section 19.

"On April 29, 1889, to Manuel J. Miller for lot 1 of section 30.

"On January 28, 1890, to Norris F. Skeen for lots 3, 4 and 5 of section 35.

"On November 9, 1891, to Annie E. Fairchild for lots 1, 2 and 3 of section 17, and lots 1 and 2 of section 20.

"Two of said patentees, Jerome Churchill and Annie E. Fairchild were original plaintiffs in this controversy. None of them have any riparian rights whatever. The lands granted by their patents were limited by the straight subdivisional and meander lines which defined the lots on the face of the map."

In like manner here the outer meander line or so called islands are shown by the survey and by every item of fact and evidence in the case to have been at the time of the Rice survey and ever since, the shore of the lake, and the inner meander line to have been that between the plateau or upland and the marsh.

In so far as there is evidence or fact in the case bearing upon that subject it is that the "islands have washed shoreward," or in other words the waters of the body of the lake instead of receding have advanced; so that instead of land area having increased by reliction it has been diminished by submersion. There has been

no new land made. The most that can be claimed is that the land is in lesser degree submerged than it was at the time Rice surveyed it and designated it a marsh. There is nothing showing either that it was at the time of the Rice survey with substantial permanence a body of water, nor that it has since become with substantial permanence anything other than a marsh. It was this marsh, and not the lake or bay that the lands of the appellant abutted upon, and private ownership in it is not affected by the degree of frequency with which the high waves from the lake or the drainage from adjacent uplands or both may temporarily submerge it.

Rice's segregation of it as marsh as distinguished from the lake or bay constituted affirmative notice to proposed purchasers of the surveyed land that this marsh intervening between the surveyed land upon one side and the lake and bay upon the others, was a proper subject of private ownership and as such subject to survey and sale whenever the government might deem it desirable to so deal with it, and hence that the surveyed land, not abutting upon lake or bay, ownership thereof would not carry with it any riparian rights. The propriety of this marsh, as it was at the time of and ever since the Rice survey, being regarded as not subject to the rules and incidents of land underlying the open waters of the body of the lake, but clearly distinguishable therefrom, and as such a proper subject of private ownership is so aptly and forcibly illustrated by a very recent decision of the Circuit Court of Appeals of the Sixth Circuit and the numerous authorities there cited, that we deem it proper to incorporate that decision in our brief. It is as follows:

"NAVIGABLE WATER—TEST OF NAVIGABILITY.

> In this country, waters, to be navigable in law, must be capable of navigation in fact as highways for the transportation of commerce. A bay or arm of one of the Great Lakes, some 4,000 acres in extent, which was patented to the state as swamp land, and which, though of sufficient depth for navigation where it opens into the lake, is throughout the remainder of its extent of an average depth of not more than 2 feet, and rarely more than 3 feet, and is covered through the summer with grass and rushes, is not navigable water, but merely a marsh, and subject to private ownership.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

The Erie Shooting Club, the complainant below, is a shooting club incorporated under the law of Michigan. The object of the incorporation was to secure, hold, and protect suitable territory for hunting and fishing for the exclusive use of its members. In pursuance of this purpose, it has acquired by lease between three and four thousand acres of land, with exclusive right to hunt and shoot thereon the wild game and fowl which might frequent said property. The lands thus secured belong in fee to its members, who have leased to the club the exclusive rights mentioned. These lands consist of the shores and submerged lands constituting a shallow, marshy body of water, called "Maumee Bay," a bay or arm of Lake Erie, and lie in Monroe county, Mich. These sub-

merged lands were surveyed and platted and patented to the state of Michigan as swamp or overflowed lands, under the swamp land act of 1850. By grants from the state, and through mesne conveyances, all the lands included within its shores, including two small islands, have become private property. The Toledo Liberal Shooting Company is an incorporation of Ohio, and, like the Erie Shooting Club, is organized for the purpose of holding and protecting lands for the exclusive use of its members as a preserve for wild game, etc. It holds under lease about 106 acres of submerged lands in about the center of Maumee Bay, and entirely surrounded by the submerged lands held under lease by the Erie Shooting Club. With this exception, the Erie Shooting Club holds leases to the entire body of submerged lands within the shores of Maumee Bay, and also holds leases which include the shores of said bay and two small islands therein—one known as "Indian Island," and containing about 36 acres, and the other known as "Card Island," with an area of about 20 acres. The entire holdings of submerged and dry lands by the said Erie Shooting Club is between three and four thousand acres, much the greater part being submerged lands.

The bill of the Erie Shooting Club represented that the Toledo Liberal Shooting Company by its officers and members, was trespassing upon the property, by entering same "with boats and otherwise," "and had with guns shot and killed, destroyed, and scared away wild ducks and other wild water fowl thereon, both before and after sunrise, and at other times." This they are charged with as having frequently done, and against the protests and objections of complainant, and that "they threaten to continue so to do, etc. Other averments are also made as to the frequency with which this conduct has been persisted in, and as to the injury done and threatened to be done to the property of complainant. The prayer of the bill was that the defendants be enjoined perpetually from entering upon the said property, and from trespassing thereon, by shooting or otherwise destroying the wild fowl thereon. Certain individuals, being officers and members of the Toledo Club, were joined as defendants, and like relief was sought against them. The Toledo Club and its members made defendants joined in defending, and by answer denied that they collectively or individually had been guilty of tresspassing upon complainant's property, by shooting thereon, or by entering upon any dry land owned or rented by complainant. They assert that the submerged lands claimed by complainant are lands under navigable waters, and deny that any exclusive right to navigate said waters has been conferred upon complainant, its members or the lessors under whom they hold, and assert the right to go on and over said water in any way or direction for the purpose of reaching and hunting upon their own submerged lands. The answer admits that complainant has "the exclusive right to the game or wild fowl found on or over" the lands lawfully held by it under lease or otherwise. Much proof was taken, both as to the character and frequency of the alleged acts of trespass committed by the defendants, and as to the character of the water constituting Maumee Bay. Upon a final hearing, the circuit court

granted a perpetual injunction restraining defendants from entering upon the waters covering the submerged lands leased by complainant, in boats or otherwise, save by a prescribed route definitely fixed by the decree, and for the sole purpose of reaching the submerged lands leased by the defendant corporation. The decree also specifically and perpetually enjoined the defendants, their licensees or agents, from "hunting or shooting with guns," or in any manner "killing or taking wild fowl of any kind upon or over the water covering the lands of complainant." From this decree, defendants have appealed.

Willis Baldwin, for appellants.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

This decree must be affirmed. The contention that the waters covering the submerged part of the lands claimed under lease by the Erie Shooting Club are navigable, and therefore subject to the public right of navigation, is not supported by the evidence in this record. The fact that this so-called "bay" was surveyed and plated as swamp land by the government affords a strong presumption against the navigability of the water thereon. This survey was under the authority of the government, which subsequently conveyed the lands so platted to the state of Michigan as swamp lands, under the act of September, 1850, known as the "Swamp Land Act." That the state subsequently conveyed them is a further circumstance tending to establish that no public easement had or could exist therein by reason of the navigability of the waters thereon.

Just where the so-called "bay" opens into the lake, at its southeast end, there is water navigable for ordinary commercial purposes. This channel rapidly shallows as the bay is penetrated. From a line drawn east and west through the center of sections 34 and 35 to the extreme northern end of this bay, a distance of over three miles, the average depth of water will not exceed two feet. There are places in which it is deeper, but in these it rarely exceeds three feet. There are large sections within the area mentioned, where the water does not average twelve inches; and considerable parts, especially in section 27, where it is not six inches in depth, except under unusual winds or freshets. An effort has been made to show that there are deeper and navigable channels permeating this shallow marsh. Several small creeks empty into this bay. The channels of one or more of these may be traced with difficulty in parts of the marsh. They soon cease to have any defined banks, and are lost in the wider waters, whose level is affected by the fluctuations of the lake. It is impossible upon this evidence to say that any one of these so-called "channels" is navigable. Their continuity is insufficient, and the proof as to their course and depth is altogether too slender and contradictory to justify a reversal of the decree below. From June to October, this body of water is covered with a mass of aquatic vegetation, such as wild rice, rushes, etc. It is then impenetrable, save by the laborious method of punting. At

no time is the greater part of this marsh susceptible of supporting "commerce," in any reasonable sense of the term. That the water stands permanently, and that it has a deep opening into Lake Erie, does not establish that this shallow body of water is capable of sustaining commerce, or is burdened with a public use. It is nothing more or less than a marsh opening into the lake. To be navigable in law, it must be navigable in fact; that is, capable of being used by the public as a highway for the transportation of commerce.

None of the characteristics of commercial navigability are shown here. It is the natural feeding ground of the duck and other water fowl. In their pursuit by canoe and flat-bottomed ducking boats the water may be navigated. That is not commerce, and proves nothing. The same test would convert every pond and swamp capable of floating a boat into a navigable stream or lake. This bay is not a highway, never has been, and can never be. At the common law the term "navigable" had a technical meaning, and was applied to all streams or bodies of water in which the tide ebbed and flowed. All such waters were public. That definition is not applicable in this country, and all waters are held navigable in law, and subject to a public use, which are by their character capable of use as highways, for purposes useful to trade or agriculture. It is the capability of being navigated for useful purposes, which is the test. Gould, Waters, § 54, and cases cited; Barney v. Keokuk, 94 U. S. 324; The Daniel Ball, 10 Wall. 557-563; The Montello, 20 Wall. 430-441; Moore v. Sanborne, 2 Mich. 519; Chisolm v. Caines, 67 Fed. 285; City of Grand Rapids v. Powers, 89 Mich. 94, 50 N. W. 661; Hall v. Alford (Mich.) 72 N. W. 137; Rowe v. Bridge Corp., 21 Pick. 344; Attorney General v. Woods, 108 Mass. 436.

In the case of The Montello, cited above, the court said:

"The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are or may become the mode by which a vast commerce can be conducted; and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said, 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable; but, in order to give it the character or a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.'"

If this is a private property, it must follow that appellants have no right to trespass thereon. Their own property being inaccessible, save by going over that of appellee, entitles them to a way of necessity. That they obtained by the decree below. Decree affirmed.

Toledo Liberal Shooting Co. v. Erie Shooting Club, 90 Fed. Rep., 680.

The facts which counsel are driven to claim as constituting a foundation for appellant's contention are that this more than four thousand acres of surface area between the surveyed lines of the lands patented to appellant's ancestor on the one side and the so-called islands on the other, was at the time of the survey in 1834 and 1835 and at the time the surveyed land was conveyed by the government in 1844, with substantial permanency a body of water such as the laws and regulations governing survey of the public lands authorized to be omitted from survey and sale; and that since that time its character has changed to that of substantial permanent land sufficiently discharged of water to become and be a proper subject of private ownership. The facts, however, are all the exact contrary of appellant's contention. They all support the correctness of the survey and report of surveyor Rice in designating it as marsh and not lake or bay and thus the manifestly apparent facts upon the ground, in harmony with the survey, field notes and plat informed the proposed purchaser of the surveyed lands that they did not so border upon either lake or bay as that ownership thereof would carry with it any rights of riparian proprietorship; and that this tract of marsh land intervening between the surveyed land and the lake was such land as was a proper subject of private ownership and subject to survey and disposal as such at the convenience of the government.

This marsh land thus being at all times, and by the government survey and plat at all times represented as being, a proper subject of private ownership; we submit that all the facts affirmatively exclude any and every hypothesis upon which that ownership ever became appurtenant to any estate of appellant in the lands included in the Rice survey and conveyed in pursuance of it.

Respectfully submitted

THOMAS EMERY,
Of Counsel.

POTTER & EMERY,
Solicitors for Appellee.